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Hogue v. State Respondent's Brief Dckt. 42844

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN ELLIOTT HOGUE,)	
)	No. 42844
Petitioner-Appellant,)	
)	Ada Co. Case No.
v.)	CV-2013-16814
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
_____)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Brian Elliott Hogue appeals from the district court's summary dismissal of his post-conviction petition. Hogue argues the district court erred when it effectively denied his blanket motion to take judicial notice of the entire record of the separate criminal proceeding.

Statement of Facts and Course of Proceedings

Hogue was incarcerated at the Ada County Jail awaiting trial for a separate, unrelated theft and check fraud case. (R., p. 1110.) Pursuant to a series of search warrants, the police searched Hogue's computer and found multiple files of explicit child pornography. (R., pp. 1110-1111.) The state charged Hogue with two counts of possession of child pornography. (R., p. 1111.)

Hogue pled guilty to one count of possession of child pornography and the state dismissed the second count. (R., pp. 1111-1119.) The district court imposed a sentence of six years with zero years fixed and ordered the sentence to run consecutively to Hogue's other sentences. (R., p. 1119.) Hogue appealed. (R., p. 410.) The appellate court affirmed his conviction. (Id.)

Hogue filed a Petition and Affidavit for Post Conviction Relief. (R., pp. 6-15.) Hogue alleged his counsel was ineffective and he was coerced into pleading guilty. (Id.) The district court appointed post-conviction counsel. (R., pp. 27-28.) At a status conference, during a discussion regarding the PSI and other documents, the district court told Hogue that in order "to take judicial

notice” Hogue needed to specify what he wanted the court to take judicial notice of. (R., p. 31.) The state answered Hogue’s initial petition and moved for summary dismissal. (R., pp. 35-56.) Hogue moved for permission to proceed pro se. (R., pp. 59-60.) The district court granted the motion. (R., pp. 61-63.)

Hogue moved under Idaho Rule of Civil Procedure 7 to have “the entire Court record of the underline [sic] criminal case (Ada County Case No.CR-FE-2011-20152) be lodged on to the record in this matter and that a copy of the complete lodging be provided to each of the parties in this matter.” (R., pp. 66-67.) Hogue also filed a motion to reconsider the district court’s denial of his motion for a copy of his PSI. (R., pp. 72-75.)

Hogue filed a “Verified Amended Application for Post-Conviction Relief” along with a voluminous affidavit. (R., pp. 78-366.) Hogue alleged:

- (a) The plea was not knowingly, intelligently, and voluntarily entered.
- (b) Ineffective assistance of counsel.
- (c) Prosecutor’s failure to disclose favorable evidence and/or information. (Brady Claim)
- (e) Non-Retroactivity of Idaho Code §18-1507A
- (F) Ex Post Facto Clause
- (g) Police and jail staff interfered with petitioner’s attorney client relationship.
- (h) Police and Jail Staff misconduct.
- (i) Widespread and systematic failure of Ada County Public Defender’s office to provide effective assistance of counsel as part of a policy or custom.
- (j) petitioner was not given procedural due process.
- (k) The sentence is cruel and unseal [sic] punishment.
- (l) Continued incarceration would constitute cruel and unseal [sic] punishment.

(R., p. 79 (capitalization and punctuation original.)

Based, in part, on Hogue's multiple filings, the district court entered an Order Providing Documents and Limiting Supplemental Argument. (R., pp. 375-377.) This order granted Hogue copies of some specific documents he requested. (Id.) The state filed an Answer to Amended Petition for Post-Conviction Relief and an Amended Motion for Summary Disposition. (R., pp. 401-423.)

Hogue then filed a series of motions, including a Motion for a Ruleing [sic] on Petitioner's Motion to Lodge the Entire Court Record of the Underline [sic] Criminal Case, Motion for Extension of Time To File a Response, an Affidavit in Support of the Motion for Extension, Objection and Motion for Reconsideration of Order for Transport. (R., pp. 433-439, 444-449.) The district court granted Hogue's motion for an extension of time. (R., pp. 440-441.)

Hogue also filed a Motion for Permission to Conduct Limited Discovery and Motion to Stay Respondent's Amended Motion for Summary Disposition and an affidavit and memorandum of law in support. (R., pp. 450-511.) The district court exhaustively examined Hogue's claims but denied his motion because Hogue "made no showing why the discovery he requests is necessary to his successive application." (R., pp. 512-524.¹) Hogue objected to the district court's denial. (R., p. 1040.)

Hogue also objected and responded to the state's motion for summary disposition and included a voluminous Memorandum of Law in Support of

¹ The district court subsequently filed a "Corrected Order Denying Motion for Discovery." (R., pp. 1088-1100.) The district court acknowledged that the initial order contained an error regarding the background facts. (R., p. 1083.)

Petitioner's Objection to Respondent's Motion for Summary Disposition. (R., pp. 525-1039.) Hogue also moved to disqualify the district court. (R., pp. 1041-1081.) The district court denied the motion for disqualification. (R., pp. 1082-1087.) The district court also entered a Memorandum Decision Re: Attorney-Client Privilege Waiver clarifying that because Hogue was making claims against his counsel he has "indeed waived his attorney-client privilege related to any matter arising in the underlying case." (R., pp. 1101-1103.)

The district court held a hearing on the state's motion for summary disposition. (R., p. 1108.) After the hearing, the district court granted the state's motion and dismissed Hogue's amended petition. (R., pp. 1109-1133.) The district court broke down each of Hogue's ineffective assistance of counsel claims and held, in part:

In this case, Hogue simply makes unsubstantiated claims and does not even identify what trial counsel should have done or what he would have discovered. Moreover, he fails to establish that such "failures" changed the outcome; in other words, no prejudice. These general claims fail and are dismissed.

In addition, Hogue did not proffer a legal basis to suppress the search of his laptop. The record clearly establishes that the search of the laptop was performed pursuant to a search warrant. Thus, this claim fails. Hogue did not proffer a basis to suppress his arrest on an unrelated case or the original search warrant in an unrelated case. He does not explain how he was prejudiced. This claim fails as well.

Finally, his claims that there were widespread and systematic "failures" in the Ada County Public Defender's Office do not support post-conviction relief. Assuming his claims to be true, Hogue presented no evidence that his trial counsel was affected by these "failures." This claim fails and is dismissed.

(R., p. 1123.)

Hogue's claim, that his appellate counsel failed to raise certain issues, also failed because Hogue did "not disclose what those additional [appellate] issues are." (Id.) The district court also held that Hogue's claim that he was coerced into pleading guilty failed because "Hogue must do more than simply claim he was coerced." (R., pp. 1124-1129.)

Finally, the district court dismissed Hogue's claims that the statutes under which he was convicted violated the ex post facto clause because those claims were not raised on direct appeal, and because "neither the *ex post facto* clause nor retroactivity is implicated." (R., pp. 1129-1132.) The district court entered judgment dismissing Hogue's petition, and Hogue timely appealed. (R., pp. 1134-1140.)

ISSUE

Hogue states the issue on appeal as:

Did the trial court err by declining to rule on Mr. Hogue's motion to lodge the entire criminal court file? Is remand required because appellate review of the proceedings below is impossible?

(Appellant's brief, p. 4.)

The state rephrases the issue as:

Has Hogue failed to show that the district court denied his motion to take judicial notice of the underlying criminal case?

ARGUMENT

Hogue Has Failed To Show The District Court Actually Denied His Motion To Take Judicial Notice

A. Introduction

Hogue argues that the district court violated Idaho Rule of Evidence 201(d) when it effectively denied his blanket request to take judicial notice of the entire underlying criminal record relating to his conviction for possession of child pornography. (Appellant's brief, pp.4-12.)

Hogue is incorrect. The district court did not effectively deny his motion. To the contrary, the district court appears to have effectivity granted Hogue's motion to take judicial notice of the underlying criminal record. After Hogue made his request to take judicial notice, the district court repeatedly referred to and relied upon the record in the underlying criminal case, including in its order summarily dismissing Hogue's petition. (See R., pp. 513-523, 1088-1100, 1109-1133.)

B. Standard Of Review

A court's decision to take judicial notice of an adjudicative fact is a determination that is evidentiary in nature and is governed by the Idaho Rules of Evidence. Newman v. State, 149 Idaho 225, 233 P.3d 156 (Ct. App. 2010); I.R.E. 201. An appellate court reviews lower court decisions admitting or excluding evidence under the abuse of discretion standard. Dachlet v. State, 136 Idaho 752, 755, 40 P.3d 110, 113 (2002).

The interpretation of court rules presents a question of law over which appellate courts exercise free review. State v. Weber, 140 Idaho 89, 91-92, 90 P.3d 314, 316-317 (2004).

C. Hogue Has Failed To Show The District Court Denied His Request To Take Judicial Notice Of The Underlying Criminal Case

Hogue moved the district court to have the “entire Court record of the underline [sic] criminal case (Ada County Case No.CR-FE-2011-20152) be lodged on to the record in this matter and that a copy of the complete lodging be provided to each of the parties in this matter.” (R., pp. 66-67; 433-434.) After Hogue filed his motions the district court entered several orders relying upon the court record in the underlying criminal case. (See R., pp. 513-523, 1088-1100, 1109-1133.) In its Corrected Order Denying Motion For Discovery, entered after Hogue asked the court to make the record of the underlying criminal case part of the post-conviction record, the district court explained that it was relying upon the “record in the underlying criminal case.” (R., p. 1089, n. 2.)

The Background is based on the police reports, the register of actions, and the record in the underlying criminal case. It is also based in part on the documents filed by Hogue in support of this post-conviction action that arise out of the other criminal case, Case No. CR-FE-2011-0003728.

(R., p. 1089, n. 2.) Later, in its order of dismissal, the court relied upon portions of the criminal record to support its rulings. (R., pp. 1109-1132.)

Instead of acknowledging that the district court effectively took judicial notice of the underlying criminal case, Hogue argues that the district court relied “upon its knowledge of the files and records in the underlying criminal case[.]”

(Appellant's brief, p. 8.) The district court reproduced the guilty plea form filled out by Hogue and quoted verbatim and at length from the transcript of Hogue's plea colloquy. (R., pp. 1112-1118.) The district court was not relying upon its "knowledge" of the underlying case to reproduce pages of underlying criminal record – the district court was taking judicial notice of the underlying criminal record. That is exactly what Hogue requested of the district court.

On appeal, Hogue argues there is an inadequate record on appeal that prevents "meaningful appellate review." (Appellant's brief, p. 7.) This is incorrect. The district court reproduced the portions of the underlying criminal record on which it was relying to make its decisions. (See R., pp. 513-523, 1088-1100, 1109-1133.) Further, the transcripts from Hogue's change of plea hearing, sentencing hearing, and the clerk's record on Hogue's direct appeal were all augmented to this appellate record. (See Order Granting Motion to Augment). There is nothing preventing Hogue from challenging the merits of the summary dismissal on appeal.

Contrary to Hogue's argument on appeal, the district court did effectively grant his motion by considering the record in the underlying criminal case. Hogue's argument boils down to his complaint that the district court did not enter a separate document titled "Order Granting Motion To Take Judicial Notice of Underlying Criminal Case." Hogue cannot show that the district court's failure to enter a separate order affected his substantial rights. See Idaho R. Civ. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.")

Again, it is clear from the record that the district court relied on the underlying criminal record in rendering its decision, and the portions of the record upon which the court specifically relied have been augmented into the record on appeal. If the district court erred by not expressly stating it was taking judicial notice of the underlying record, such error was harmless and did not affect Hogue's substantial rights. Hogue has failed to show any basis for reversal.

D. In The Alternative, If The District Court Denied Hogue's Blanket Motion To Take Judicial Notice The District Court Acted Within Its Discretion To Deny Hogue's Blanket Request To Take Judicial Notice Of The Entire Court Record Of The Separate Criminal Case

In the alternative, if the district court denied Hogue's motion, the district court was well within its discretion to do so. Idaho Rule of Evidence 201(d) creates, by its plain language, a mandatory duty for a court to, upon the request of a party, take judicial notice of documents from a court file when certain requirements are met.

(d) When Mandatory. When a party makes an oral or written request that a court take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information.

I.R.E. 201(d). Specifically, pursuant to this rule, a party "shall" either "identify the specific documents or items," or "proffer to the court and serve on all parties copies of such documents or items." I.R.E. 201(d). Where a party does not provide the court with this "necessary" information, the mandatory duty of I.R.E. 201(d) does not apply. To the contrary, where a party "does not meet this

requirement it is improper for a court to take judicial notice under I.R.E. 201(d).” Taylor v. McNichols, 149 Idaho 826, 835-836, 243 P.3d 642, 651-652 (2010); see also Martin v. Camas Cty. ex rel. Bd. Comm’rs, 150 Idaho 508, 512, 248 P.3d 1243, 1247 (2011) (“Request to take judicial notice did not comply with I.R.E. 201(d) because request did not “identify the specific documents or items for which judicial notice is requested.”).

Hogue moved the district court to have the “entire Court record of the underline [sic] criminal case (Ada County Case No.CR-FE-2011-20152) be lodged on to the record in this matter and that a copy of the complete lodging be provided to each of the parties in this matter.” (R., pp. 66-67; 433-434.) Hogue’s motions for judicial notice did not specifically identify any particular documents, nor did he provide copies of any documents to the court or to the state. (See R., pp. 66-67; 433-434.) Hogue argues that “he did identify the specific documents and items requested, *i.e.*, the entire Court record of the underlying criminal case.” (Appellant’s brief, p. 6.) Hogue’s argument is contrary to Idaho law. See Martin, 150 Idaho at 512, 248 P.3d at 1247 (holding that a request to take judicial notice of the general proceedings in another case “did not comply with I.R.E. 201(d), as that Rule requires the requesting party to identify the specific documents or items for which judicial notice is requested”); see also Taylor, 149 Idaho at 835-836, 243 P.3d at 651-652.

Hogue did not comply with the requirements of I.R.E. 201(d). Correspondingly, the district court could have properly denied Hogue’s “blanket request” for judicial notice. Because Hogue failed to comply with the

requirements of I.R.E. 201(d) the district court had no mandatory duty to grant Hogue's blanket request that it take judicial notice of documents from the underlying criminal case. Even if the district court denied Hogue's blanket request for judicial notice, Hogue has failed to demonstrate that the district court abused its discretion by doing so.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 3rd day of March 2016.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of March, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

DENNIS BENJAMIN
NEVIN, BENJAMIN, McKAY & BARTLETT LLP

at the following email address: db@nbmlaw.com

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd